

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

INTRA-AMERICAN FOUNDATION &
DRILLING CO., INC.,

Plaintiff and Appellant,

v.

R.M. HARRIS COMPANY, INC., et al.,

Defendants and Respondents.

A119957

(Contra Costa County
Super. Ct. No. C9802023)

I. INTRODUCTION

Intra-American Foundation & Drilling Co., Inc. (IAFD) initiated this proceeding after it was removed as a subcontractor on a construction project to replace the Salinas River Bridge. An arbitrator rejected IAFD's claims that it was wrongfully removed from the project and awarded attorney's fees to the project owner, the California Department of Transportation (Caltrans), the general contractor, R.M. Harris Company, Inc. (Harris), and Harris' sureties, United States Fidelity & Guaranty Company and St. Paul Fire and Marine Insurance Company (jointly, the Sureties). The superior court granted petitions to affirm the arbitration award and entered judgment against IAFD.

On appeal, IAFD contends the judgment must be reversed because the arbitrator exceeded his authority and his decision is not supported by substantial evidence. IAFD also contends that respondents are not entitled to attorney's fees. We reject most of these contentions but will modify the judgment to strike the fee award to Caltrans because we find no authority to support it.

II. STATEMENT OF FACTS

In January 1997,¹ a flood damaged the Salinas River Bridge in Monterey County. The bridge, which was comprised of two parallel structures, was part of State Highway 101. Portions of the northbound structure collapsed necessitating a re-routing of all highway traffic to the southbound structure. Future flooding was expected and there was a serious concern about additional damage to the southbound structure of the bridge.

On May 5, Caltrans entered into an emergency contract with Harris to replace the Salinas River Bridge (the prime contract). On June 23, Harris entered into a subcontract with IAFD to perform pile driving work for the project (the IAFD contract). The IAFD contract, which incorporated the prime contract, required IAFD to furnish, weld and drive cast-in-place steel shell piling, which would be filled with concrete and rebar and then would function as support for the bridges. The IAFD contract also contained the following “satisfaction” clause: “Subcontractor guarantees that the materials furnished and the work performed will strictly comply with the General Contract and this Subcontract, and shall be satisfactory to Owner [Caltrans] and Contractor [Harris]”

Design plans for the new bridge included an estimated pile driving depth at which it was believed that the support piles would bear the weight of the bridge. In order to field test this estimate, IAFD was required to drive an “indicator pile” before driving the permanent support piling for the bridge. The prime contract provided that Caltrans would use a pile driving analyzer (PDA) to test the indicator pile. A PDA measures soil resistance forces along the pile shaft by tracking wave reflections caused by each hammer blow as the indicator pile is installed. Installing the indicator pile was the first order of work on the project. The project schedule called for IAFD to complete driving the indicator pile within seven days of starting work on the project.

According to the daily report log kept by Caltrans’ resident engineer, IAFD was to commence installation of the indicator pile at 9:00 a.m. on June 12. However, because IAFD’s crane malfunctioned, IAFD did not start driving the casing until 5:00 p.m. On

¹ Chronological references in our Statement of Facts are to the 1997 calendar year.

the afternoon of June 16, IAFD began driving the pile into the casing. However, after the pile had been driven in 16 feet, Caltrans rejected it because IAFD “could not make the pile plumb” and the pile was actually touching the casing. PDA testing cannot be performed when a casing and indicator pile are touching. IAFD removed the casing and pile from the ground and discovered both were severely damaged. Caltrans believed the damage resulted from improper installation but IAFD maintained that the damage was caused by an underground obstruction.

IAFD commenced installation of a second indicator pile on June 19. Pursuant to Caltrans’s instructions, and over IAFD’s objection, IAFD drove the second indicator pile in the exact same location where the first pile had been removed. The second indicator pile did not encounter any underground obstruction. However, PDA test results showed that the second indicator pile was damaged which prevented Caltrans from determining its bearing capacity. Caltrans suspected the damage resulted from IAFD’s inadequate welding of the casing for the indicator pile. After significant additional delay, a visual inspection of the welds confirmed that there were several faulty welds.

On July 12, IAFD began driving a third indicator pile in a different location. On July 29, this third indicator pile was successfully driven to the distance specified in the prime contract. However, the test pile had to be driven a further distance, resulting in additional delay, because the hammer IAFD used to drive the indicator pile did not comply with contract requirements and precluded accurate PDA testing. After IAFD’s first hammer was rejected by Caltrans, IAFD utilized a second, non-conforming hammer which was also rejected.

Meanwhile, on July 18, Harris requested permission from Caltrans to substitute IAFD off the project on the grounds that IAFD’s work was unsatisfactory and not in compliance with the project plans and specifications. Harris notified IAFD of the

substitution request on July 19. On August 7, Caltrans held a substitution hearing pursuant to Public Contract Code section 4107 (section 4107).²

On August 14, Caltrans granted Harris permission to substitute IAFD off the project. The Caltrans hearing officer who granted the substitution request supported his determination with several findings and conclusions including that (1) the emergency contract provided that work was to be completed within 180 days and included a liquidated damages provision for each calendar day of delay; (2) the first order of work was to drive the indicator pile in order to gather data needed to determine the depth at which the production piles were to be placed; (3) the indicator pile was to be driven in seven calendar days; (4) the first indicator pile was driven out of plumb and the second indicator pile failed because of faulty welds; (5) 101 working days had already been charged to the project of which 54 days were controlled by driving the indicator pile; (7) the project was 56 days behind schedule; (8) for unexplained reasons, IAFD did not perform any work during 21 of the 41 calendar days charged to the project; (9) some of IAFD's equipment was inadequate to perform the work; and (10) IAFD substantially contributed to delays to the project schedule.

On August 16, Harris terminated its contract with IAFD.

III. PROCEDURAL HISTORY

A. *IAFD Law Suits*

On September 15, 1997, IAFD filed a petition for peremptory writ of mandate in Sacramento County pursuant to which it sought to compel Caltrans to vacate its decision granting Harris permission to substitute IAFD off the project.

² Section 4107, part of the Subletting and Subcontracting Fair Practices Act, limits a prime contractor's ability to substitute a subcontractor listed in the original bid in a public contract. Subdivision (a)(7) of section 4107 authorizes a substitution "[w]hen the awarding authority, or its duly authorized officer determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work."

On May 7, 1998, IAFD filed a breach of contract complaint against Harris and the Sureties in Contra Costa County. On January 25, 1999, the superior court granted defense petitions to stay proceedings on the complaint and compel arbitration of IAFD's claims.

On March 19, 1999, IAFD, Caltrans and Harris entered into a stipulation to dismiss the IAFD mandamus petition. This stipulation provided, among other things: "Neither the Consent to Substitution nor any of the opinions, statements or findings of the [Caltrans] hearing officer shall have any preclusive effect whatsoever, whether under the doctrines of collateral estoppel, *res judicata*, *stare decisis*, or otherwise, on any issue in any judicial, administrative or arbitration proceeding."

On June 4, 1999, IAFD filed a complaint against Caltrans in Monterey County, seeking damages for interference with and inducement to breach the IAFD contract. On October 4, 1999, the Monterey County Superior Court granted Caltrans' motion to compel arbitration of IAFD's claims against Caltrans.

B. *The Arbitration*

On January 10, 2000, Harris filed a complaint for arbitration before the Office of Administrative Hearings. Among other things, Harris asserted claims against IAFD and Caltrans for its increased costs relating to the substitution of IAFD.

On or about February 7, 2000, IAFD filed a cross-complaint in the arbitration against Harris, the Sureties and Caltrans. Pursuant to a first amended cross-complaint, IAFD alleged causes of action against Harris for breach of the IAFD contract, quantum meruit, and account stated. It alleged claims against Harris and the Sureties for violation of California's prompt payment statutes and for enforcement of a payment bond. IAFD also alleged claims against Caltrans for negligent and intentional interference with contract and inducement of breach of contract.

On September 18, 2001, the parties filed a stipulation to appoint the Honorable William Gallagher (Ret.) as neutral arbitrator in this action. The arbitration hearing commenced on January 19, 2004, lasted 27 days spread out over an entire year and concluded on December 13, 2004. On October 20, 2005, the arbitrator issued a 21-page

decision denying all claims by all parties. Thereafter, Caltrans, Harris and the Sureties moved for attorney's fees. On April 18, 2006, the arbitrator filed a 23-page "Final Award on the Merits, Costs and Attorney's Fees."

The arbitrator's final decision has three primary components, the first of which is an 11-page detailed narrative of the evidence followed by the arbitrator's ultimate conclusions that: (1) the Harris substitution request was reasonable and in accordance with the relevant contracts; (2) the Caltrans substitution hearing was a fair hearing; (3) IAFD failed to prove any of its claims against Harris or Caltrans; (4) IAFD would recover nothing from Harris or Caltrans; and (5) Harris would recover nothing from IAFD or Caltrans.

The second part of the arbitrator's final decision sets forth 87 specific findings of fact and law which further explain and provide support for the arbitrator's ultimate conclusions. Finally, the decision contains an award of costs and attorney's fees. The arbitrator made express findings that Caltrans, Harris and the Sureties were all prevailing parties. IAFD was ordered to pay (1) Caltrans \$14,275 in costs and \$299,040 in attorney fees, (2) Harris \$38,009.35 in costs and attorney's fees in the amount of \$490,024.40, and (3) the Sureties \$29,290.65 in costs and \$441,021.96 in fees. To avoid dual recovery, the award of costs and fees to the Sureties was included within Harris's award.

C. *The Superior Court Order and Judgment*

On July 25, 2006, IAFD filed a petition to vacate the arbitration award accompanied by a request that the court take judicial notice of the evidence presented at the arbitration hearing. IAFD alleged that (1) it was denied due process because it was not permitted to participate in selection of the arbitrator; (2) the arbitrator exceeded his powers by giving preclusive effect to the Caltrans substitution hearing; (3) the arbitrator refused to consider IAFD's evidence; and (4) the award was not supported by substantial evidence.

After conducting a hearing on February 13, 2007, the Honorable Judith Craddick issued a written order denying IAFD's petition to vacate and its request for judicial notice. On August 8, 2007, the court filed a 14-page statement of decision in support of

the denial of IAFD's petition to vacate the arbitration award. In the meantime, both Caltrans and Harris filed petitions to affirm the arbitration award. The court granted both petitions and entered judgment on October 2, 2007.

IV. DISCUSSION

A. *Issues Presented and Standard of Review*

The parties agree that the State Contract Law (Pub. Contract Code, §§ 10100, et seq.) applies in this case involving a dispute arising out of a public construction contract. Accordingly, our scope and standard of review are different from those ordinarily applied to judgments confirming arbitration awards. Public Contract Code section 10240.12 states that "a court shall vacate the award, or part thereof, if it determines either that the award, or part thereof, is not supported by substantial evidence or that it is not decided under or in accordance with the laws of this state." In the present case, IAFD has alleged both insufficiency of the evidence and legal error as grounds for reversal of the arbitration award. We review the trial court's rulings on IAFD's petition under the substantial evidence test, except for legal determinations, which we review independently. (*County of Solano v. Lionsgate Corp.* (2005) 126 Cal.App.4th 741, 752.)

B. *The Arbitrator Conducted An Independent Review*

IAFD's first contention is that the arbitrator committed legal error by exceeding his authority. (See Code Civ. Proc., § 1286.2, subd. (a)(4) [court "shall" vacate award if arbitrator exceeded his authority and award cannot be corrected without affecting the merits of the decision].) As noted in our factual summary, prior to the arbitration in this case, the parties stipulated that no "opinions, statements or findings" of the Caltrans hearing officer who conducted the substitution hearing would have "any preclusive effect whatsoever." IAFD contends that the arbitrator disregarded this stipulation and gave preclusive effect to the findings of the Caltrans substitution hearing officer.

We find nothing in the record before us to support IAFD's claim of legal error. Rather, the arbitrator's 23-page final decision, with its detailed evidentiary summary and its 87 findings of fact and law, constitutes an independent analysis and resolution of the numerous issues and claims that were presented during the lengthy arbitration

proceeding. By way of example only, we quote a few of the most salient findings as they pertain to the issues on appeal:

The first indicator pile:

“41. IAFD damaged the first indicator pile casing during delivery effectively compromising the strength of the casing by flattening a portion of the side of the casing.

“42. IAFD’s first attempt to drive an indicator pile failed because the 72” pile, driven inside of a 90” casing, became crushed and folded over.

“

“48. The second test pile was driven at the exact same location as the first casing and the second test pile did not encounter any difficulty driving the specified distance.

“49. IAFD failed to provide evidence that the first indicator pile casing encountered a buried manmade object.”

The second indicator pile:

“60. IAFD performed the welding of the casing and second indicator pile.

“61. After the casing and indicator pile were driven, the PDA results indicated that there was a void in the steel.

“62. Caltrans inspected the welds and determined that the welds had voids which caused Caltrans to not be able to obtain PDA results.

“63. IAFD agreed to perform the work knowing that there was no quality control inspection and is estopped from claiming that Harris and Caltrans breached the contract by not performing the quality control inspection.

“64. IAFD breached the contract by failing to provide a quality product which met the contract requirements.

“65. Caltrans properly rejected the work performed by IAFD related to the second indicator pile and was justified in not paying IAFD for any work related to the second indicator pile.”

The third indicator pile:

“66. The third test pile was successfully driven the specified distance.

“67. In driving the third test pile, IAFD utilized inappropriate equipment which could not mobilize the test pile so that PDA testing could be performed.

“

“69. PDA testing requires an impact hammer large enough to mobilize the test pile at less than 120 blows per foot.

“70. IAFD’s initial hammer reached a blow count of 500 blows per foot and its second hammer reached a blow count of over 300 blows per foot.

“71. Caltrans properly rejected both of IAFD’s hammers because they failed to meet the contract requirements in driving the test piles.

“72. The third test pile was required to be driven an additional distance in order to obtain the necessary bearing information to begin constructing the permanent piles.

“73. Caltrans compensated IAFD the additional unit costs to drive the casing the additional distance including time extensions.”

Substantial delay:

“75. Between June 12, 1997 and August 14, 1997, IAFD made three attempts to drive the indicator pile as specified in the contract as the first order of work.

“76. The original progress schedule submitted by Harris allocated 7 calendar days for the operation related to the indicator pile.

“

“80. Between June 12, 1997 and August 14, 1997, 73 working days were charged to the contract while IAFD was in control of the Project work.

“81. Among these 73 working days, there were a total of 46 working days that either no work was performed on the controlling operation or days were lost due to IAFD’s faulty equipment and workmanship.

“82. In the remaining 36 working days that IAFD did work on the controlling operation of work, IAFD made three attempts to drive the indicator pile.

“

“87. Kiewit Pacific (‘Kiewit’) was brought onto the Project to complete IAFD’s work, and completed 24 piles in 56 days, the same time that IAFD failed to complete even one.”

Substitution:

“77. On August 7, 1997, Caltrans conducted a hearing regarding Harris’ substitution request.

“

“79. After giving both parties an opportunity to present testimony at the hearing, Caltrans’ hearing officer granted Harris’ request to substitute based on a finding that IAFD substantially contributed to delays on the Project schedule because of failure to comply with the plans and specifications and that there was no reasonable assurance that this schedule slippage would be overcome by IAFD.

“

“83. The substitution request by Harris was a reasonable action and was within the provisions of the contract.

“84. Pursuant to the contract, Caltrans performed a fair substitution hearing and with good cause concluded that IAFD was delaying the Project and was not able to perform its duties under the Prime Contract or the Subcontract.”

“85. The Arbitrator finds that Harris properly terminated IAFD and that IAFD could not perform its contractual duties in a timely fashion and that this termination was in good faith on the part of Harris.

“86. The Arbitrator finds that Harris properly terminated IAFD in compliance with Public Contract Code § 4107(a)(7).”

IAFD simply ignores these and other relevant findings in the arbitrator’s final decision which clearly demonstrate that the arbitrator made his own independent decisions in this case. More disturbing to us, IAFD resorts to mischaracterizations of the record in a misguided effort to strengthen its claim on appeal. For example, IAFD’s brief states that, once the arbitrator “found Caltrans conducted a ‘fair substitution hearing,’ he summarily denied IAFD’s claims because of the preclusive effect of the actual and

implied findings from that hearing.” This statement strains credulity. The arbitrator did not “summarily” deny anything. Nor did he expressly or implicitly state that any finding by the Caltrans substitution hearing officer had preclusive effect.

IAFD also contends there was no legitimate reason for the arbitrator to make findings regarding the validity or fairness of the substitution hearing. We disagree. The fairness of that hearing was a relevant issue, raised and litigated by all of the parties in this case. IAFD’s breach of contract claim against Harris and its interference claims against Caltrans were premised on the contention that IAFD was wrongfully substituted off this project. Harris’s defense to the breach of contract claim was that the substitution was consistent with its statutory and contractual rights and obligations. Indeed, before the arbitrator rendered his decision, IAFD expressly requested that the arbitrator make findings regarding alleged impropriety on the part of the Caltrans substitution hearing officer.

At oral argument before this court, IAFD’s appellate counsel was adamant that the arbitrator found that the substitution hearing “was res judicata,” and that he refused to consider any evidence pertaining to events that occurred after IAFD was substituted off the job. However, counsel conceded that IAFD was permitted to introduce extensive evidence regarding events that occurred after the substitution. Furthermore, counsel has not provided any reference to the appellate record to support her claim that the arbitrator in any way applied the doctrines of res judicata or collateral estoppel in this case.

Finally, IAFD seeks to bolster its claim by mischaracterizing the superior court’s ruling on this issue. According to IAFD, “[t]he trial court found that the arbitrator gave preclusive effect to the substitution hearing, but that by doing so he did not exceed his authority.” To support this assertion, IAFD refers us to a vague exchange that took place during the superior court hearing on its petition to vacate the arbitration award. As IAFD well knows, the court did not make any findings at that hearing. In any event, as a matter of law, the court’s actual “finding” on this issue appears in its statement of decision. (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1756.) It states:

“Judge Gallagher did not exceed his powers as arbitrator by giving effect to the prior administrative hearing performed pursuant to California Public Contract Code sections 4100, et seq. (the ‘substitution hearing’). The Final Award’s lengthy findings of fact and conclusions of law indicates that Judge Gallagher considered the evidence presented (26 days of proceedings and over 400 exhibits) and made an independent and reasoned decision as to why IAFD was not entitled to recover damages. A decision as to the propriety of the result of the substitution hearing was required to resolve key issues presented in the arbitration, namely, whether Harris’s termination of IAFD’s Subcontract was reasonable in light of the Subcontract’s satisfaction clause. There is no credible evidence that Judge Gallagher did not independently consider the evidence presented by the parties at the arbitration. . . .”

IAFD has completely failed to substantiate its claim that the arbitrator gave preclusive effect to the findings of the Caltrans substitution hearing officer. Indeed, the record shows that the arbitrator reached his own independent conclusions based on the evidence presented at the arbitration. Therefore, we reject IAFD’s contention that the arbitrator exceeded his powers by disregarding the parties’ stipulation.

C. *Substantial Evidence*

IAFD contends that the award must be vacated because there is insufficient evidence to support the following finding made by the arbitrator: “Pursuant to the terms of the Subcontract, IAFD was bound to perform all of the duties of the Prime Contract relevant to its work to the satisfaction of Caltrans. Caltrans’ reasonable dissatisfaction with IAFD’s performance is a complete defense to Harris’s termination of IAFD.”

As noted in our factual summary, the IAFD contract contained a satisfaction clause, requiring it to perform to the satisfaction of both Caltrans and Harris. IAFD does not dispute that this clause was enforceable or that the standard of a reasonable person applies to the determination whether satisfaction has been received. (See *Mattei v. Hopper* (1958) 51 Cal.2d 119, 123.) Rather, IAFD argues that there is insufficient evidence to support the arbitrator’s finding that Caltrans’ dissatisfaction with IAFD’s performance was reasonable. We disagree.

Evidence was presented that IAFD damaged the first indicator pile it attempted to install, failed to properly weld the second indicator pile that it installed, and used improper equipment to install the third indicator pile. There was also evidence that IAFD failed to perform this first order of work in a timely fashion, that timeliness was reasonably expected and that the entire emergency project was delayed as a result of IAFD's failure to properly install the indicator pile in a timely fashion.

IAFD maintains that it produced evidence at the arbitration which conclusively established that Caltrans' claimed dissatisfaction with IAFD's performance was not reasonable as a matter of law. According to IAFD, the evidence showed that, after IAFD was removed from the project, problems arose which established that the Caltrans plans and specifications for the new bridge were defective and that Caltrans admitted as much to both Harris and to Kiewit Pacific, the subcontractor that replaced IAFD. In light of this evidence, IAFD argues, Caltrans' exercise of the satisfaction clause based on erroneous plans and specifications was unreasonable.

Evidence of plan or design problems that arose or became apparent after IAFD was removed from the construction project might arguably support an inference that similar problems affected IAFD's efforts to install a proper indicator pile. But the arbitrator was not compelled to draw such an inference particularly in light of the direct evidence of IAFD's faulty workmanship and failure to timely perform, evidence which substantially supports the finding that Caltrans and Harris were both reasonably dissatisfied with IAFD's performance.

For example, during the arbitration, IAFD took the position that the first indicator pile failed because it hit an underground obstruction. To support this theory, IAFD relied on evidence that, after it was substituted off the job, significant time and money was spent removing underground man-made obstructions from the job site. The arbitrator simply was not persuaded by IAFD's theory in light of other evidence that IAFD was negligent when it attempted to install the first indicator pile. Specifically, the arbitrator referenced witness testimony that "IAFD was driving the indicator pile and the casing off plumb, and that the two were actually at such divergent angles that the pile eventually hit

the side of the casing and bent it over.” The arbitrator also relied on evidence that “the second indicator pile was driven in the exact location as the first indicator pile and did not strike any obstruction.”

Anticipating that it would fail to persuade us to ignore substantial evidence that its performance was unsatisfactory, IAFD argues, in the alternative, that the substantial evidence standard of review does not apply at all because the arbitrator erroneously refused to actually consider most of IAFD’s evidence. As factual support for this argument, IAFD relies on the following excerpt from the arbitrator’s final decision:

“... IAFD attempts to cloud the reasons for its termination by pointing to various change orders and time extensions that occurred after IAFD was substituted off the job. However, at the time of the termination the facts were simple: the indicator pile work on the Project was behind schedule, IAFD was on the controlling path, and Caltrans rightly blamed IAFD. Caltrans was the party whose contractual requirements IAFD had to comply with, as the Prime Contract was incorporated into the Subcontract by reference and IAFD was bound to perform all of the duties of the Prime Contract relevant to its work to the satisfaction of Caltrans. IAFD did not perform to Caltrans’ satisfaction, and its dissatisfaction was reasonable and justified under all the existing circumstances. Whatever events occurred after the substitution with Kiewit are not probative of IAFD’s situation.”

IAFD contends that this statement by the arbitrator “confirms he relied on the preclusive effect of the substitution hearing because he did not consider events that occurred after Kiewit’s substitution.” This contention is illogical at more than one level. First, if the arbitrator had given preclusive effect to the findings made at the substitution hearing (which he did not), he would not have independently considered *any evidence*, regardless whether it pertained to events that occurred before or after the substitution hearing. Second, the passage quoted above simply cannot reasonably be construed as an evidentiary ruling. Rather, this excerpt from the arbitrator’s final decision confirms that the arbitrator did, indeed, consider IAFD’s evidence and then reached the conclusion that it was not “probative of IAFD’s situation.” In other words, problems that occurred later

and pertained to other facets of the construction project were not relevant in light of direct evidence that IAFD failed to satisfactorily install the indicator pile in a timely fashion.

At oral argument, IAFD's appellate counsel argued that the arbitrator's failure to even "mention" evidence of events that occurred after IAFD was substituted off the job, notwithstanding that he made 87 findings of fact and law, demonstrates that he failed to consider that evidence at all. As discussed above, the arbitrator explicitly referenced IAFD's evidence of underground obstructions at the job site when it found that IAFD negligently installed the first indicator pile. Furthermore, the arbitrator implicitly acknowledged IAFD's evidence each time he rejected IAFD's contention that it reasonably performed its contractual obligations. The fact that the arbitrator was not persuaded by IAFD's theory and evidence simply does not compel the conclusion that he failed to adequately consider them.

Finally, IAFD shares its interpretation of various items of evidence that were introduced at the arbitration hearing which, in IAFD's view, support its theory that Caltrans' claimed dissatisfaction was unreasonable. This lengthy commentary is irrelevant, however, in light of our standard of review and our conclusion that substantial evidence does support the arbitrator's finding that Caltrans' dissatisfaction with IAFD's performance was reasonable.

D. *The Superior Court Reviewed the Evidence*

In a separate argument, IAFD contends that the trial court failed to conduct the substantial evidence review of the arbitrator's findings that is mandated by Public Contract Code section 10240.12. IAFD takes the position that the court *could not have* conducted a proper review of the evidence because it denied IAFD's motion to take judicial notice of the record of the arbitration hearing. As noted above, along with its petition to vacate the arbitration award, IAFD filed a request that the superior court take judicial notice of the record from the arbitration proceeding conducted before the Office of Administrative Hearings. IAFD maintains that, because the court denied that request,

it necessarily failed in its obligation to review the findings of the arbitrator to determine if they were supported by substantial evidence.

Several circumstances documented in the record before us establish that, contrary to IAFD's argument, the trial court did review the arbitration record. First, on January 2, 2007, the Office of Administrative Hearings lodged the entire record of the arbitration (five boxes of documents) with the superior court. This evidence was received by the court on January 4, 2007. Second, at a hearing prior to issuance of its final decision, the court stated that it denied the request for judicial notice because the arbitration record was already a part of the court file. Third, in its statement of decision, the court expressly stated that, before it issued its final decision, it "reviewed the evidence and argument presented during the arbitration hearing that is the subject of IAFD's petition to vacate" Fourth, many of the 23 separate findings of fact set forth in the statement of decision were supported by direct references to the record of the arbitration proceeding. Fifth, the court referred to the arbitration evidence when making several conclusions of law including that "each key finding of fact in [the arbitrator's] Final Award is supported by evidence and exhibits introduced in the arbitration," and that "[u]nder the 'substantial evidence' test applicable to [the arbitrator's] decision, his Final Award is clearly supported by the record of the proceedings." Finally, in its statement of decision, the court stated that it reviewed the specific evidence from the arbitration that the parties had attached to and filed with their lower court pleadings and claimed was directly responsive to IAFD's substantial evidence challenges.

IAFD intimates that judicial notice was *required* before the arbitration evidence could properly have been considered by the lower court, notwithstanding that the entire arbitration record was lodged in the superior court and that relevant evidence from the arbitration was attached to the parties' pleadings that were filed in this case. First, IAFD cites no authority which actually supports this proposition. Second, the facts discussed above, which establish that the superior court *did in fact* consider and review the evidence from the arbitration, renders harmless any alleged error with respect to the ruling on the request for judicial notice.

E. *Attorney's Fees*

IAFD contends the arbitrator exceeded his authority by awarding attorney's fees to any of the respondents.

1. *Background*

As discussed earlier in this opinion, the arbitrator found that IAFD failed to prove any of its claims against any of the respondents. He also made express findings that Caltrans was the prevailing party as a matter of law, that Harris was the prevailing party against IAFD,³ and that the Harris Sureties were also prevailing parties. As to each respondent, the arbitrator also found that the amount of attorney's fees requested was fair and reasonable.

The arbitrator awarded attorney's fees to respondents pursuant to section 1392, subdivision (c), of the California Code of Regulations which states: "Reasonable attorney's fees may be awarded in accordance with Public Contract Code Section 10240.13 or other applicable law, if any." The arbitrator did not rely on section 10240.13, which authorizes an attorney's fee award against a party who has acted frivolously or in bad faith. Instead, he found that other applicable laws authorized awarding attorney's fees to all of the respondents, and expressly referenced Civil Code section 1717, Public Contract Code, section 10262.5, Business and Professions Code, section 7108.5, and Civil Code, section 3250.

2. *Harris*

IAFD contends that the arbitrator exceeded his authority by awarding Harris attorney's fees and that, even if he had such authority, the amount awarded to Harris is excessive as a matter of law. We separately address and reject these two contentions. First, we find numerous statutory bases for the fee award to Harris.

³ The arbitrator found that Harris failed to prove its claims against Caltrans but denied Caltrans' request for fees against Harris on the ground that all of Harris' claims against Caltrans "were based only on theories of Indemnification for which Reciprocal award of attorney fees is not authorized under California law." This ruling has not been challenged on appeal.

Civil Code section 1717, subdivision (a) (section 1717(a)) states in part: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs. . . .” In this case, IAFD sued Harris for breach of contract and sought attorney’s fees pursuant to section 1717(a) based on an attorney fee provision in the IAFD contract. The arbitrator found that IAFD failed to prove this breach of contract claim and that Harris was the prevailing party. Therefore, Harris is entitled it to recover fees related to this contract claim pursuant to section 1717.

On appeal, IAFD contends that the only provision in the IAFD contract pertaining to attorney’s fees is paragraph 21(c) which provides that, in the case of a default by the subcontractor, the contractor is entitled to its expenses incurred to complete the work including “all legal expenses.” Notwithstanding that this provision was the contractual basis for IAFD’s prayer for attorney’s fees in its complaint, IAFD now contends that this provision cannot be reasonably construed as authorizing the recovery of attorney’s fees incurred during litigation. Harris, by contrast, maintains that its fees are recoverable under this provision because these legal proceedings are the direct consequence of Harris’s efforts to cure IAFD’s default by substituting it off the job. Obviously, IAFD shared Harris’s interpretation of this contract provision at the outset of this litigation when IAFD sought attorney’s fees pursuant to section 1717. Furthermore, section 1717 expressly provides that if a contract contains an attorney’s fees provision, that provision applies to the entire contract. (§ 1717(a).) Therefore, we are not persuaded by IAFD’s contention that section 1717 does not apply.

Civil Code section 3250 (section 3250) states that, in any action on a payment bond issued in connection with a public works project, “the court shall award to the prevailing party a reasonable attorney’s fee, to be taxed as costs.” IAFD sued Harris for enforcement of a payment bond and requested attorney’s fees pursuant to section 3250.

IAFD failed to prove this claim and Harris was declared the prevailing party. Therefore, Harris was entitled to recover attorney's fees under section 3250.

IAFD contends that section 3250 limits recovery of attorney's fees to "actions" on the bond and that an arbitration is not an action because it is not a judicial proceeding. Before arbitration commenced, IAFD initiated three separate judicial proceedings against these parties, two of which were stayed pending arbitration. As this court has held, when an arbitration is an integral part of an action on a bond, the prevailing party is statutorily entitled to fees incurred during the arbitration. (*Liton Gen. Engineering Contractor, Inc. v. United Pacific Insurance* (1993) 16 Cal.App.4th 577, 582-587.).

Public Contract Code, section 10262.5 and Business and Professions Code section 7108.5 are prompt payment statutes which regulate progress payments to subcontractors. Both Public Contract Code section 10262.5 and Business and Professions Code section 7108.5 contain the following identical provision: "In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs." Here, IAFD sued Harris for violating these "prompt payment" statutes. IAFD contends that the arbitrator did not make any ruling regarding this claim. However, as repeatedly noted above, the arbitrator found that IAFD failed to prove *any* of its claims and that Harris was the prevailing party as against IAFD. Therefore, Harris was entitled to recover attorney's fees pursuant to sections 10262.5 and 7108.5.

IAFD's second challenge to the Harris fee award is that it is excessive as a matter of law. According to IAFD, the arbitrator should have apportioned fees among the various claims asserted against Harris and then limited Harris's recovery to only those claims with respect to which fees were recoverable. IAFD fails to support this contention with any meaningful factual analysis. In particular, IAFD does not explain how the fees could or should have been apportioned among the various claims. The likely explanation for this omission is that all of the claims against Harris were interdependent and involved the same core of factual and legal issues.

"When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party

may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not. All expenses incurred on the common issues qualify for an award. [Citation.] When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required. [Citations.]” (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133.)

This same rule applies to contractual attorney’s fees. When a cause of action based on a contract that provides for attorney’s fees is joined with other non-contract claims, fees should be apportioned between the two types of claims. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.) However, “[a]ttorney’s fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.” (*Ibid.*; see also *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687 [“Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney’s time into compensable and noncompensable units”]; *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493 [“Attorney’s fees need not be apportioned between distinct causes of action where plaintiff’s various claims involve a common core of facts or are based on related legal theories”].)

We find that all of IAFD’s claims against Harris and the other respondents involved a core set of facts and interrelated legal issues. Therefore, the arbitrator did not abuse his discretion or otherwise err by declining to apportion Harris’s attorney’s fees.

3. *The Sureties*

IAFD sued the Sureties for enforcement of the payment bond and expressly sought fees pursuant to section 3250. IAFD failed to prove this claim and the Sureties were found to be the prevailing parties. Therefore, section 3250 authorizes the fee award to the Sureties. Furthermore, the payment bond itself contained an attorney’s fees clause

which affords an independent contractual basis for the fee award to the Sureties. (§ 1717.)

A third basis for the fee award to the Sureties was the attorney's fee provision in the IAFD subcontract. Under California law, a surety is liable along with the principal for contractual attorney's fees incurred under a subcontract. (*T&R Painting Construction Inc. v. St. Paul Fire & Marine Ins. Co.* (1994) 23 Cal.App.4th 738, 744-746.) Section 1717 provides "a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail" (*Reynolds Metals Co. v. Alperson, supra*, 25 Cal.3d at p. 128.)

IAFD complains that the Sureties "did not actively participate in the arbitration." However, it offers neither support for this opinion nor any concrete basis upon which to question whether the level of the Sureties' participation in this case is commensurate with the amount of fees awarded to them.

4. Caltrans

Caltrans does not have a contractual right to attorney's fees pursuant to section 1717. Contrary to Caltrans's contention on appeal, IAFD did not allege a claim against Caltrans for breach of the IAFD contract. Rather, it sued Caltrans for intentional interference with contract, negligent interference with contract and inducement of breach of contract. These are all tort claims. (See *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126; *Stout v. Turney* (1978) 22 Cal.3d 718.) "Section 1717 does not apply to tort claims; it determines which party, if any, is entitled to attorney's fees on a contract claim only. [Citations.]" (*Exxess v. Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708; see also *Topanga and Victory Partners, v. Toghia* (2002) 103 Cal.App.4th 775.)

Caltrans contends that its fee award is authorized by the attorney's fees clause in the IAFD contract because section 1717 provides "'a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail.'" (Quoting *Reynolds Metals Co. v. Alperson, supra*, 25 Cal.3d at p. 128; also citing *T&R Painting*

Construction, Inc. v. St. Paul Fire & Marine Ins. Co., *supra*, 23 Cal.App.4th 738, 746.) However, Caltrans was not sued “on a contract” and it has neither established nor even suggested that IAFD would have been entitled to recover attorney’s fees from Caltrans had IAFD prevailed on its contract claim against Harris.⁴

Section 3250 does not apply to Caltrans because IAFD’s first amended cross-complaint expressly limited its claim for enforcement of the payment bond to Harris and the Sureties. Caltrans contends that section 3250, the payment bond statute, authorizes its fee award because this case constitutes an action on a payment bond and section 3250 provides that in “any” action on a payment bond, the court “shall” award fees to the prevailing party. This argument is not supported with legal authority or logical reasoning. Caltrans was the prevailing party *only* with respect to the causes of action alleged against it. Caltrans was not named as a defendant with respect to the cause of action to enforce the payment bond. Therefore, section 3250 does not authorize the fee award to Caltrans.

Nor can we accept Caltrans’s argument that Public Contract Code section 10262.5 and Business and Professions Code section 7108.5 authorize the award. In this regard, Caltrans contends that IAFD’s cause of action for violation of the prompt payment statutes “was brought against both the State and Harris.” In contrast to its other causes of action, IAFD’s claim for violation of the prompt payment statutes was not expressly limited to specific defendants. However, the allegations pleaded in support of that cause of action pertained exclusively to conduct by Harris and the Sureties who, according to the first amended cross-complaint, “refused without lawful excuse to pay IAFD the amounts due under the subcontract” in violation of sections 10262.5 and 7108.5. We simply cannot reasonably construe this or any other allegation in IAFD’s cross-complaint as stating a claim against Caltrans for violating the prompt payment statutes. Therefore,

⁴ At oral argument before this court, Caltrans’ appellate counsel conceded that section 1717 does not authorize the fee award to Caltrans.

we find that IAFD never did allege a cause of action against Caltrans for violating the prompt payment statutes.

We also reject Caltrans's contention that its fee award is authorized by Public Contract Code section 10240.13 which provides for recovery of attorney's fees when substantial evidence establishes that a party has acted frivolously or in bad faith in its demand for, or participation in, the arbitration. The arbitrator did not rely on this provision and his lengthy and thorough final decision does not contain any express or implied findings that IAFD acted frivolously or in bad faith. Therefore, on the record before us, section 10240.13 does not authorize the attorney's fee award to Caltrans.

V. DISPOSITION

The judgment is modified to strike the award of attorney's fees to Caltrans. As modified, the judgment is affirmed.

Harris and the Sureties are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).) In the interests of justice, Caltrans and IAFD are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

Haerle, J.

We concur:

Kline, P.J.

Richman, J.